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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL.,
Petitioners,
v.
ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES, ET AL.,
Respondents,
v.
INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, ET AL.,
Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioner, WERNER C. VON CLEMM, hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court which affirmed the decision and judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported. It is set forth as Appendix B to this petition.

The opinion of the District Court is reported in 255 F. Supp. 353. It is also set forth on pages A-3 through A-51 of petitioner's Appendix, printed for the use of the Court below and nine copies of which are filed in this Court with this petition under the provisions of Rule 21, paragraph 4.*

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928 (28 U.S.C. §1254(1)). The judgment of the Court below was entered on June 22, 1966.

The Questions Presented

1. Whether the burden of proof imposed by the Courts below upon petitioner violates the Fifth Amendment of the United States Constitution.

2. Whether petitioner upon the facts found by the Courts below was an "enemy agent" of the German Government within the meaning of the Trading with the Enemy Act.

Constitutional and Statutory Provisions Involved

The pertinent parts of Amendment V to the United States Constitution, and Sections 9(a) and 2 of the Trading with the Enemy Act, as amended (50 U.S.C. App. §§(2) and 9(a)), are set forth in Appendix A hereof.

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* Unless otherwise indicated, references herein are to the pages of petitioner's Appendix filed in the Court below and now on file in this Court.

Summary Statement

This suit was brought under Section 9(a) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 9(a)) (the "Act"). Jurisdiction in the District Court was based upon 28 U.S.C. §1331.

Petitioner seeks recovery of stock of Pioneer Import Corporation ("Pioneer") and the proceeds, amounting to approximately $1,300,000, realized from the sale of certain diamonds, synthetic and semi-precious stones, which were vested under Section 5(b) of the Act and sold by the Alien Property Custodian in 1945 (A-3-4).

There are related administrative proceedings which are still pending before the Office of Alien Property. *Matter of 40 Consolidated Claims of Carrie M. K. Beir, et al.*, Dkt. No. 183, Office of Alien Property (1955). Chief Hearing Examiner Harry L. Jones has there held with respect to the claims of petitioner that he was not "an enemy agent" of the German Government nor "enemy tainted." His opinion was marked as Plaintiff's Exhibit B in the trial court. It is presently awaiting review by the Attorney General. *International Mortgage & Investment Corp.* v. *Von Clemm,* 301 F. 2d 857, 859 (2d Cir. 1962).

Section 2 of the Act provides, so far as pertinent here, that the word "enemy" is defined as:

> "(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

Petitioner is a naturalized United States citizen, having emigrated to this country from Germany in 1922. He has since resided and been domiciled in the United States

and he became a citizen in 1932. He married a United States citizen, has two children, both born, reared and educated in this country (A-8, 9). Since 1933 petitioner has been engaged in the importing business, and he is still in that business (A-9-21).

Petitioner's Activities Prior to December 11, 1941—U. S. Declaration of War

In 1938, petitioner formed Pioneer to import into the U. S. goods from Germany, the purchase price of which was to be paid in part with German "blocked marks" and in part with U. S. dollars. The use of blocked marks, as found by the Court of Appeals, was "purely commercial" (Appendix B. p. 3b). Moreover, none of the products involved in this proceeding were purchased with blocked marks. The goods imported consisted of toys, vacuum bottles and lily bulbs and the like. They were purchased in Germany by a German firm called "Eurohandel". Petitioner's brother, Carl, a national and resident of Germany, was then employed by that firm (A-10, 13). About October, 1939, Carl resigned from Eurohandel and organized a German firm referred to as "Imico". Thereafter, the purchases of Pioneer and its successor firms, of goods from Germany, for export to the U. S. were from Imico (A-17).

After the cessation of operations by Pioneer, in 1940, petitioner formed F. M. Alison & Company, and then in April, 1941, a partnership, Bridge Import Company ("Bridge"), to continue his business (A-18-19).

The war had begun in Europe in September, 1939, and the British had set up a blockade of Germany. The United States entered the war on December 11, 1941.

Until June 14, 1941, when the President extended the "freeze order" (Executive Order 8389, 12 U.S.C. §95a note) to Germany, goods from that country could be freely imported into this country under United States law* (Appendix B. pp. 3b-4b). Such trade with Germany had the full approval and encouragement of the U. S. authorities. On April 8, 1940, the Legal Advisor to the Secretary of State wrote petitioner that:

> "* * * You may be assured that the Department [of State] is doing all that it can to assist American importers of German goods * * *" (A-125).

Despite the fact that it was lawful to engage in such importing activities under U. S. law, the British blockade made it difficult for importers such as petitioner to do so (Appendix B, p. 4b). Resort had to be made to codes, circuitous routes and other methods to avoid the British authorities (A-16). In spite of the utilization of all of these methods, it finally became impossible to import bulky goods through the British blockade. (A-77-81). As a result, petitioner began to import diamonds and synthetic and semi-precious stones which are the subject of this action.

While the Presidential freeze order of June 14, 1941 was in effect, petitioner imported three shipments of diamonds. The first was cleared by U. S. Customs and sold by him. As a result of this sale, petitioner was convicted in 1943, in the U. S. District Court for the Southern District of New York, on the charge that he had made a false customs declaration that the diamonds were cut in Germany instead of Holland and Belgium as the Government alleged (Appendix B, p. 6b). This first shipment is

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* Executive Order 8389 did not prohibit the importation of goods as such, but provided that payment for the goods could not be made without a license from the U. S. Treasury (A-20).

not involved in this proceeding. The second and third shipments, covered by invoices dated December 4, 1940 and February 17, 1941, respectively, were detained by Customs, ultimately vested by the Alien Property Custodian and later sold (Appendix B. p. 6b). Petitioner seeks the proceeds of sale in this action.

The relationship between Imico and petitioner with respect to the semi-precious stones transactions was similar to that with respect to the diamond transactions, except that there was in addition the so-called "Jalmaç", or German Navy transaction, which occurred, however, in 1939 before the United States entered the war (Appendix B, p. 7b).

Based upon the foregoing, the Courts below found that petitioner was an agent of the German Government prior to the declaration of war on December 11, 1941 (A-38; Appendix B, p. 6b).

Petitioner's Acts After December 11, 1941

There were only three post-war incidents, that is, incidents after December 11, 1941, which will be discussed in detail hereafter. It will suffice, at this point, to say that the District Court stated that these three incidents, standing alone, would not justify a finding of enemy agency after December 11, 1941 (A-40). The Court goes on to state, however, that the three incidents may be indicative of the continuation of petitioner's pre-December 11, 1941 operations, and the Court so found (A-40-44).

The Court of Appeals affirmed on similar reasoning, and said with respect to the evidence of petitioner's activities after the war: "part * * * tends to show he ceased his importing operations, and part the opposite, although none of the evidence is conclusive." (Appendix B, p. 8b).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Court of Appeals decided an important question of Federal law as to the meaning of "enemy agent" under the Trading with the Enemy Act, which has never been settled by this Court.

The District Court held petitioner to be "an enemy agent" under the Act. Thus, the Court's holding, without more, results in a confiscation of the property of an American citizen, and a branding of that citizen as a traitor to his country. This Court has held that such "confiscation is not easily to be assumed." *Guessefeldt* v. *McGrath,* 342 U. S. 308, 319 (1952).

The meaning of the term "enemy agent", as the District Court below observed, is not defined in the Act (A-35). Moreover, the "few judicial decisions" (A-35) referred to by the District Court related to situations far different from that in the instant case.* The District Court and the Court of Appeals reached their conclusions without benefit of any precedents for guidance:

> "I am called upon to decide this question without the benefit of controlling authority either way" (A-43).

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* *Sarthou* v. *Clark,* 78 F. Supp. 139 (S.D. Cal. 1948) involved a German citizen engaged in espionage missions in France and elsewhere. *Hansen* v. *Brownell,* 234 F. 2d 60 (D.C. Cir. 1956) involved a claimant who resided in Germany from 1939 until April 1948, and had taken an active part in the furtherance of the German war effort by propaganda work. *Stadtmuller* v. *Miller,* 11 F. 2d 732 (2d Cir. 1926) concerned a German citizen who was present in Germany throughout World War 11. *Rusche* v. *Brownell,* 136 F. Supp. 835 (D.C. 1955), *aff'd* per cur. 244 F. 2d 782 (D.C. Cir. 1957) involved employment by a claimant in an executive fashion in a German corporation, which manufactured equipment for the German Army during the war, with residence in Germany at the time as a German citizen.

Petitioner's Acts Before December 11, 1941, Upon Which the Court Below Found Agency

In reaching its conclusion that petitioner was an "enemy agent", the Court below made no attempt to construe the term by reference to the statute, its legislative history or other usual tools of construction. Nor did the Court apply elementary principles of agency such as: that the agent be subject to the control of, and have power to act for and bind, his principal (Appendix B. pp. 9b-10b).

The Court below applied two criteria in finding that petitioner was an agent of the German Government before December 11, 1941. The first was that the diamond and stone transactions "were beneficial to the German Government" in providing foreign exchange (A-37). But such benefit to the German Government, resulting from commercial activities engaged in primarily to derive private profit, before the war, would not make petitioner an agent of the German Government. Chief Hearing Examiner Jones so held at p. 168 of his opinion (*supra,* p. 3). See also *Manufacturers Trust Co.* v. *Kennedy,* 291 F. 2d 460, 463, (2d Cir. 1961).

The second criterium applied by the Courts below in holding petitioner an agent of the German Government before the outbreak of war with the United States was the designation by the German Government of Imico as exclusive exporter and Imico's designation, in turn, of petitioner as "sole importer" to the United States (A38). Again Chief Examiner Jones, is to the point, at p. 168 of his opinion, when he states:

> "• • • The fact that von Clemm for Pioneer was given the exclusive franchise of importing Idar-

> Oberstein products under Germany's controlled economy does not make von Clemm an agent of the German government. * * *"

We believe that the Courts below erred in their conclusion that petitioner was a German agent prior to December 11, 1941, and this conclusion was basic to their ultimate determination of his ineligibility as an "enemy agent", to seek recovery of his property.

Petitioner's Acts After December 11, 1941—The "Three Incidents"

The "three incidents" after December 11, 1941 do not show any "continuance" of petitioner's agency, assuming such pre-war agency did exist. The District Court pointed out that these acts of petitioner were "not extensive" and then concluded (A-40):

> "If there were no other evidence in this case and if the burden of proof were upon the government, it is by no means clear that these three incidents, by themselves, would justify a finding that von Clemm acted on behalf of the German Government after December 11, 1941."

Then the District Court reasoned as follows (A-41):

> "Once we start with the premise that von Clemm's activities before December 11 made him a German agent at that time * * * then the burden is upon von Clemm to show that he discontinued those activities upon the outbreak of war."

As to the burden of proof, the District Court stated (A-39):

> "The question must be decided upon the evidence in the present case, bearing in mind that the bur-

den is on plaintiff to prove a negative, i.e., that he was not an enemy."

The District Court and the Court of Appeals then took the view that the three post-war incidents might be indicative of the continuation after the outbreak of war, of pre-war operations. That possibility it next combined with a presumption of the continuance of those pre-war operations. And this presumption, in turn, it combined with the imposition of the burden of proof upon petitioner to prove a negative and to show by affirmative acts the termination of his pre-war operations (A-41-42). The three post-war incidents were as follows:

1. *The "First Incident"*

Petitioner sent the following cable on December 18, 1941, to Lambercier, a Swiss national, who was a special partner in Bridge:

> "SEND PROOF DIAMOND ONE SAME AS OTHERS. LICENSE 213177 NO FUNDS WHILE MERCHANDISE HELD PENDING INVESTIGATION" (A-107).

This concerned the first shipment of diamonds ("Diamond One"), which were released by U. S. Customs and sold by petitioner, resulting in his conviction on the charge of having made a false declaration as to their origin.

When petitioner sent the cable he was under Grand Jury investigation as to the origin of these diamonds. The issue there was whether they were cut in Belgium, or in Holland or in Germany. In an entirely understandable attempt to clear himself, he sought proof of their German origin as represented by him to Customs. Hence, this cable. Obviously, it concerned a wholly different matter—the pending Grand Jury investigation (A-32).

2. *The "Second Incident"*

This incident also occurred after December 11, 1941. The District Court described it and never commented upon it thereafter. The District Court stated that in March, 1942, von Clemm received a letter dated January 7, 1942, from Le Coultre & Cie of Geneva. The letter stated that by order of A. Baccala of Switzerland, Le Coultre had consigned two boxes of stones to Bridge. In September, 1941, petitioner had solicited business from Baccala. But petitioner never accepted this shipment of stones (A-33-34).

For petitioner was then out of business. He had no further interest in the shipment. He merely did what any responsible businessman would do: he referred the shipment to another dealer in New York (A-34). In so doing, he received no profit or other remuneration as a result. These stones were vested by the Alien Property Custodian in 1948 (A-72-73, A-91-92).*

This incident cannot possibly be regarded as any evidence that petitioner continued the pre-December 11, 1941 transactions beyond that date. It establishes the exact opposite, namely, that petitioner was out of business and had terminated a pre-December 11, 1941 transaction.

3. *The "Third Incident"*

On April 21, 1942, petitioner applied for a license, pursuant to Executive Order No. 8389, to pay into a blocked account in a New York bank a sum which he owed to Lambercier (A-34).

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* The Court of Appeals incorrectly states that "von Clemm, on receiving the stones, turned them over to another dealer." (Appendix B, p. 9b). The District Court's finding, however, is that "von Clemm did not accept the shipment of stones from Le Coultre" (A-34).

This "third incident" established in the District Court's view that petitioner "tried to carry on as well as he could with what he had previously been doing" (A-40). The District Court erroneously took the view that petitioner was still "seeking delivery of several shipments of stones which Lambercier had sent him" (A-41).

But clearly the District Court could not have understood the purpose of Executive Order No. 8389, or what a license thereunder to pay into the blocked account of a creditor in New York accomplished.

The Executive Order empowered the Secretary of the Treasury to inaugurate a system of licenses which permitted a person in the United States who owed money to a blocked foreign national to pay the funds into a blocked bank account in New York City in the name of that blocked national. But the "banks of course, into which accounts were paid, held them as blocked funds and could make no payments without a [further U. S. Treasury] license." Reeves, *The Control of Foreign Funds by the United States Treasury,* 11 LAW AND CONTEMP. PROB. 17, 41 (1945). Petitioner's application to pay funds into a blocked New York account was denied. Therefore, he was never in a position to make—and he did not make—any application for a further license to pay Lambercier funds or Imico funds out of a blocked New York account.

Payment into the blocked account of Lambercier would not have resulted in any "trading" or "dealing" with Lambercier or indeed in any payment to him. And the Treasury Department would continue to have "full and complete control" of these funds. *Alexewicz* v. *General Aniline & Film Corporation,* 181 Misc. 181, 184-5, 43 N.Y.S. 2d 713, 718-9 (S. Ct. Broome Co. 1943).

Thus petitioner was not engaged in any wrongful conduct when he applied for a license merely to make a

payment into a blocked account in Lambercier's name in New York. Indeed, the contrary is the fact. Further, it was sometimes essential that such license application be made in order lawfully and properly to protect one's rights in connection with an existing indebtedness. *Iwazo Yamashita* v. *Clark*, 75 F. Supp. 51, 57-58 (D. Hawaii 1948).

The merchandise transactions for which petitioner sought licenses had been fully executed when petitioner's application was made. There was nothing left to be done. There was only a unilateral obligation by petitioner to pay Lambercier (A-92). That obligation under New York law was suspended by the intervention of war and not voided. Therefore, petitioner was required to pay his debt when the war was terminated. *Neumond* v. *Farmers Feed Co.*, 244 N. Y. 202, 206 (1926). It was necessary that he apply for a license to pay funds into a blocked account for Lambercier in New York in order to protect his own post-war position. See Reeves, *The Control of Foreign Funds by the United States Treasury, supra*, p. 12, at p. 41.

In any event, an application for a license, which merely constitutes the seeking of permission of the Treasury Department to do the thing sought cannot be construed as violative of any law. As Chief Examiner Jones said at p. 169 of his opinion:

> "Application for license is compliance not defiance of freezing regulations."

Thus, the only three incidents, which involved petitioner subsequent to December 11, 1941, contribute nothing toward establishing that he was "an enemy agent" of the German Government after the declaration of war. The three incidents in fact confirm our contention that the

District Court's conclusion that petitioner was "an enemy agent" was based solely upon legal business transactions which took place prior to December 11, 1941. But that is not sufficient.

If the decision of the Court of Appeals is allowed to stand, the activities of American businessmen in the export and import business will be subject to unjust attack. This case, therefore, is of general public interest and importance. Further, if the Court below erred, the injustice to the petitioner is extreme, consisting as it does not only of confiscation of $1,300,000 of his property but his branding for life as a traitor to his country.

II.

The burden imposed by the District Court on petitioner to prove a negative and to show affirmatively that he was not an enemy agent under the Act violates due process, and the failure of the Court of Appeals to consider this matter calls for an exercise of this Court's power of supervision.

The District Court's reasoning as to petitioner's burden of proof began with the erroneous premise that petitioner's activities before December 11, 1941 made him a German agent. Because of that it placed the burden upon him to show affirmatively that he had discontinued those activities upon the outbreak of war. The Court then held that petitioner had not sustained that burden (A-41-42).

Highly significant is the fact that petitioner's position here is analogous to that of a defendant. He is challenging the Government's action by protesting against a seizure of his assets, which were summarily possessed by

the Alien Property Custodian, without the opportunity having been afforded him to protest that the seizure was unjustified under the Trading with the Enemy Act. *Societe Internationale* v. *Rogers*, 357 U. S. 197, 210-211 (1958).

It is notable in this connection also that the Alien Property Custodian made no finding in the vesting orders —as is the usual practice—that petitioner was "an enemy" under the Act. Chief Examiner Jones pointed this out and then stated—with utmost pertinence here—that this cast the burden of proving enemy status upon the Alien Property Custodian. Examiner Jones stated, at page 168 of his opinion:

> "Von Clemm was never determined by the Custodian in any vesting order to be an enemy; consequently the burden of establishing his enemy status, in view of his residence in the United States during the war, rests upon the Claims Section [of the Office of Alien Property]."

Nevertheless, the Court of Appeals did not even mention or discuss this serious issue respecting the burden of proof imposed upon petitioner even though that issue was strongly raised in our briefs and in our oral argument.

The presumption invoked by the District Court and ignored by the Court of Appeals did result—and also would result—in a discriminatory application of the Act to U. S. citizens. Any act must apply in the same manner and without discrimination to all citizens. *Duncan* v. *Missouri*, 152 U. S. 377, 382 (1894). Petitioner's acts prior to the declaration of war—since not illegal—cannot justify the adverse presumption invoked here against him, and form the substantive basis for a discriminatory application of the Act against him.

No other case under Section 9(a) of the Act has been found wherein a court held the claimant to be an enemy under the Act as a result of activities engaged in prior to the declaration of war. Further, no court has held that pre-war activities were presumed to have continued beyond the declaration of war, thus requiring claimant to bear the burden of showing by affirmative action that his pre-war activities were discontinued in order to avoid being branded an enemy agent.

Other courts have considered pre-war activity by way of background, but in those cases the courts have emphatically insisted that the Government show affirmatively that such background activity was engaged in after the declaration of war. They have further insisted that such post-war activity, standing by itself, must demonstrate that claimant was "an enemy" under the Act. *E.g. Sarthou v. Clark, supra,* p. 7, at p. 145.

We have found no case in which a claimant was held ineligible to seek recovery under the Act because he could not prove a negative, that is, furnish affirmative proof that he was not an enemy agent. When the claimant, as here, proves that he is a U. S. resident and citizen, and denies the allegation that he is an enemy agent, the burden of going forward with evidence to prove the contrary should be upon the Alien Property Custodian.

The District Court, affirmed by the Court of Appeals, violated the Fifth Amendment to the United States Constitution, we submit, by improperly imposing upon petitioner an impossible, an unreasonable and an unauthorized burden of proof—thus branding him a traitor and depriving him of his property without due process of law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1966.

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment V to the United States Constitution in pertinent part provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 9(a) of the Training with the Enemy Act, as amended (50 U.S.C. App. Section 9(a)), provides in pertinent part as follows:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, * * * and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ."

Section 2 of the Trading with the Enemy Act, as amended (50 U.S.C. App. Section 2), provides in part as follows:

> "The word 'enemy', as used herein, shall be deemed to mean, for the purpose of such trading and of this Act [sections 1-6 and 7-39 of this Appendix]—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> (b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.
>
> (c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy'. . . ."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 427—September Term, 1965.

(Argued June 3, 1966 Decided June 22, 1966.)

Docket No. 30288

WERNER C. VON CLEMM, *et al.*,
Plaintiffs-Appellants,

—v.—

ELIZABETH RUDEL SMITH, Treasurer of the United States, *et al.*,
Defendants-Appellees,

and

INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, *et al.*,
Intervenor Defendants-Appellees.

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, *Judge*, —— F. Supp. ——, in favor of defendants, in an action brought by United States citizen pur-

suant to §9(a) of the Trading with the Enemy Act, 50 U. S. C. App. §9(a), seeking recovery of certain property vested by the Alien Property Custodian.

Affirmed.

JOHN A. WILSON, New York, New York (Robert L. Clare, Jr., B. G. Andrews, Thomas A. Dieterich, and Shearman & Sterling, New York, N. Y., on the brief), *for appellants.*

BRUNO A. RISTAU, Attorney, Department of Justice, Washington, D. C. (John W. Douglas, Asst. Attorney General and Morton Hollander, Dept. of Justice, Washington, D. C., Robert M. Morgenthau, U. S. Attorney, Southern District of New York, on the brief), *for appellees.*

AMOS J. PEASLEE, JR. and WALDEMAR J. DITTMAR, New York, New York (George Eric Rosden, and Butler, Koehler & Tausig, Washington, D. C., of counsel), *for intervenors.*

SMITH, *Circuit Judge*:

Werner C. von Clemm individually and as a partner of Rayford D. Alley, Trustee for von Clemm's children, in Bridge Import Company, appeals from a judgment dismissing the suit brought pursuant to §9(a) of the Trading with the Enemy Act, 50 U. S. C. App. §9(a), by himself and Alley against the Treasurer of the United States and against the Attorney General, to recover property vested by the Alien Property Custodian under §5 of the Act. The District Court for the Southern District of New York,

Edward C. McLean, *Judge,* held that von Clemm was an enemy under the Act, and therefore not entitled to recover. —— F. Supp. ——. The court did not reach the question of title. We find no error and affirm the judgment.

Von Clemm sought recovery of shares of stock in Pioneer Import Corporation of New York and of diamonds and synthetic and semi-precious stones or their proceeds. The jewels were seized prior to the outbreak of war with Germany (December 11, 1941) by Customs and by Postal authorities, and vested by the Alien Property Custodian in 1945.

Judge McLean's opinion contains a full statement of the facts. It is enough here merely to state the following. Von Clemm was a citizen of this country born in Germany. Around 1938 he conceived of a plan to import German goods into this country by paying for them one-half in dollars and one-half in German Marks which could be obtained at a substantial discount due to the fact that they were blocked. His plan was to have the owners of these blocked Marks purchase the German products in Germany, and send them to the United States through Pioneer, which he had organized, and through associates in Europe. Apparently this scheme was purely commercial. In any case none of the goods at issue here were paid for in any part with blocked Marks.

On May 10, 1940, the Low Countries were overrun by the German armed forces. On that date the Presidential freezing order of April 10, 1940, covering Denmark and Norway, Executive Order 8389, 12 U. S. C. §95a note, was extended to these newly occupied countries. Under the order, transactions in property with those countries, and, more directly, transactions in payment for such property, were severely regulated, so that exports from those occu-

pied countries to the United States could neither enter this country, nor could payment therefor leave this country, without license. This order was extended to most other European countries, including Germany and Switzerland, on June 14, 1941. See 12 U. S. C. §95a note. Until that date there was no impediment on importing German goods into this country from Germany or Switzerland, although importers had to avoid the British blockade.

Eleven days after the low countries were occupied, on April 21, 1940, von Clemm sent a memorandum to his brother, a German national, under an assumed name, in Bologna, Italy. The memorandum stated:

> The recent Rotterdam developments should make it interesting for us to enter the diamonds picture . . . . Please discuss with Cremer.

Cremer was an official of the German Economics Ministry (RWM), an expert on diamonds, with whom von Clemm had conferred in Europe in 1939. He was in Belgium as advisor to the German military government there as to the sale in the United States of Belgium diamonds for dollars. There is no direct evidence that von Clemm knew of Cremer's status in Belgium.

On October 25, 1940, Cremer submitted a memorandum to one Major Lemberg, the official of the German military government in charge of Belgium diamonds, which said:

> The isolation of Belgium from the entire other foreign world makes resumption of the diamond export possible only with the assistance of Germany as mediator [middle man?] . . . In accordance with personal conferences, the Imico-Handel, Berlin . . . . takes over the function of the necessary intermediate agency in Germany.

Imico was a German firm set up by Carl von Clemm, appellant's brother, and two associates, all of whom had previously worked for Eurohandel, a firm which had assisted in the blocked Marks transactions. The Cremer memorandum explains the role of Imico in diamond shipments: Belgian diamonds go by courier to Berlin, where Imico arranges the necessary papers, ships the diamonds to a neutral agent (a "cloak") in Portgual, who sends them along to New York; the New York buyer makes payment to a Berlin bank for account of Imico, which turns the money over to the German government. There was no direct evidence that von Clemm knew of this memorandum. Lemberg testified that Imico was the commercial agent of the Reich, but not that von Clemm knew this.

Between October 26, 1940 and early February, 1941, six packages of diamonds were sent by this route, according to plan. Evidence was introduced that a New York diamond purchaser received a letter from a former Belgian supplier offering diamonds, and accompanying the letter was a note instructing the buyer to make payment for credit of Imico at the Berlin bank, and to address communications to [an alias of] one of the Imico organizers in Lisbon. The Belgian supplier testified that he was directed to write the letter by Lemberg.

So far von Clemm's knowledge of the role of the German government as the real exporter and the party receiving payment is largely a matter of suspicion. But there is evidence that on June 27, 1940, Imico wrote Pioneer concerning diamond purchases, and said, "The Reich Economic Ministry want to do business with us and you . . . , your commission to be 2 percent," shipment via Lisbon. Based upon this and other evidence the District Court found that prior to the outbreak of war with Germany, von Clemm was a [knowing] agent of the German

government in the export of Belgian diamonds. This conclusion is unassailable, and we regard appellant's attack on this finding as frivolous.

One of the diamond shipments cleared customs in this country, and the diamonds were sold. This resulted in a conviction of von Clemm on conspiracy to import under a false declaration that the diamonds were of German origin, and to violate §95a and the freezing order as applied to Belgium. *United States* v. *Von Clemm,* 136 F. 2d 968 (2 Cir.), cert. denied 320 U. S. 76 (1943). The other shipments were seized by Customs and later vested by the Alien Property Custodian, and sold.

Von Clemm also engaged in the importation of German cut semi-precious and synthetic stones prior to the outbreak of war. Most such stones apparently are manufactured and/or cut in Germany, with the United States historically the principal market. This industry was highly regulated in Germany, but not, in a technical sense, nationalized. The German government regulated the export of the stones, in particular. Commencing in 1939, the government informed the stone cutters that export of the stones would have to be through Eurohandel. At the same time Eurohandel cabled Pioneer "RWM appoint you sole importer synthetics." When Imico was formed it was designated by the RWM as the replacement for Eurohandel as the exclusive exporter of the stones. Apparently Imico performed much the same services as with the diamonds. It paid the cutters, and received payment from von Clemm. Dollars were sent to neutral countries by von Clemm (first to the low countries, later Switzerland), and were drawn on by Carl von Clemm and others in Imico. The stones themselves were shipped by way of a Swiss "cloak" named Lambercier, who was made to appear the purchaser of the stones for his own account, and the exporter to the

United States as owner of the stones. 270 packages of stones were seized by Postal authorities in this country, turned over to Customs, and vested by the Alien Property Custodian.

The evidence in these transactions tending to show von Clemm was an agent of the German government as to them was, besides the similarity to the diamond transactions, the fact that some of von Clemm's payments went to the account of the German Navy in Switzerland, under a code name "Jalmac," which name appears in von Clemm's books of account. Von Clemm denied knowledge that the Navy was the recipient of the funds, but the District Court did not believe him, and found he was an agent of the German government as to these transactions. Such a finding may be disturbed if it is clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. However, the similarity to the diamond transaction and the existence of the name "Jalmac" are enough to make this finding not clearly erroneous. *Dickenson* v. *Burnham,* 197 F. 2d 973, 977-8 (2 Cir.), cert. denied 344 U. S. 875 (1952); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 433 (2 Cir. 1945). It is implicit in the finding that von Clemm knew the German government was ending up with the funds and that Imico was its arm, and while this is largely an inference from undisputed facts (except as to von Clemm's denial, which, having been disbelieved, is worthless), a matter which has been held more freely reviewable, *Orvis* v. *Higgins,* 180 F. 2d 537 (2 Cir.), cert denied 340 U. S. 810 (1950), *Mottaghi* v. *Barkley Importing Co.,* 244 F. 2d 238, 248 (2 Cir.), cert. denied 354 U. S. 939 (1957), it is now settled that such inferences are themselves to be respected unless clearly erroneous. *Commissioner* v. *Duberstein,* 363 U. S. 278, 291 (1960); *United States* v. *United*

States Gypsum Co., 333 U. S. 364, 395 (1948). We can hardly reverse to substitute for one inference another which is no more probable.

But, as all the parties recognize, it is von Clemm's status after December 11, 1941, when hostilities commenced with Germany, that determines whether he is an enemy, and so barred here. Von Clemm had the burden of persuasion on the issue of his enemy status, as on every issue, *Societe Internationale Pour Participation, etc.* v. *Rogers*, 357 U. S. 197, 212 (1958). He attempted to meet this burden by a denial that he continued to operate as he had before. The District Court did not believe him. In addition, evidence was adduced as to conduct after the outbreak of the war, part of which tends to show he ceased his importing operations, and part the opposite, although none of the evidence is conclusive.

First, on December 18, 1941, one week after the outbreak of war, von Clemm cabled Lambercier asking that he "Send proof diamond one same as others" and noting that "License 213177 no funds while merchandise held pending investigation." The District Court interpreted the first phrase to mean that von Clemm, facing indictment on the first diamond shipment, desired proof of the German origin of the diamonds (which were in fact Belgian). While this is not altogether clearly the meaning, especially in view of the fact that Lambercier apparently played no role in the diamond transactions, as interpreted by the District Court it is of some slight relevance on the question whether von Clemm continued his activities after December 11.

The second event was that von Clemm received in March, 1942, a letter dated January 28, 1942, from Le Coultre & Cie of Geneva saying that it had consigned two boxes of stones to Bridge. This dealt with a shipment negotiated

before the outbreak of war. Von Clemm, on receiving the stones, turned them over to another dealer.

Finally, on April 21, 1942, von Clemm applied for a license to pay funds *into* a blocked account of Lambercier, but was unsuccessful. The money was in payment of a pre-war shipment then held by Customs.

Additionally, there was evidence that von Clemm's attorney advised him to cease dealing with Lambercier after Lambercier in January, 1942 was placed on the Proclaimed List of Blocked Nationals, and to dissolve the Bridge partnership, of which Lambercier was by then a partner. To this von Clemm replied that he would wind up Bridge, and notify the Treasury. There was no evidence that he did either.

Von Clemm argues that these events are insufficient to show that he was an agent of the German government after the outbreak of war. But since he had the burden of proving he was not an enemy agent, the only relevance of these events is insofar as they meet his burden. Von Clemm argues that the presumption that an agency continues is inapplicable in the case where war intervenes, *Insurance Co.* v. *Davis,* 95 U. S. 425 (1887), and the government counters with *William* v. *Paine,* 169 U. S. 55 (1898), and *Sutherland* v. *Mayer,* 271 U. S. 272, 288 (1926). But these cases deal with whether an agent's authority is terminated by war, a question we regard as irrelevant. Certainly if von Clemm ever had any authority to bind the German government, the intervention of war did not alter the intent of the parties to that agency. And the word "agent" in §2 does not really mean an agent in the sense of one with authority to bind, rather, it means merely one who carries out instructions, an operative, as in the colloquial "secret agent." Since one could be

found to be an enemy agent having no authority to bind the enemy government, cases dealing with the termination of commercial agency are inapposite.

All von Clemm has to meet his burden is his denial, which was not believed, his correspondence with his attorney concerning the dissolution of the Bridge partnership, and the rather equivocal "refusal" of the Le Coultre shipment. It was not error for the District Court to conclude that he had not met his burden of proving non-enemy status.

Affirmed.